

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6432

PETITION OF BARBARA A. CURTIS

OPINION OF THE BOARD

(Opinion Adopted: May 7, 2014)

(Effective Date of Opinion: May 22, 2014)

Case No. A-6432 is an application for a variance of 9.25 feet from the 20-foot rear lot line setback required by Section 59-C-1.323(b)(2) of the Montgomery County Zoning Ordinance. The Petitioner proposes to build a room addition. The subject property is Lot 22, Block C, Kensington View Subdivision, located at 11210 Midvale Road, Kensington, Maryland, 20895, in the R-60 Zone.

The Board of Appeals held a hearing on the application on May 7, 2014. William Benson of Nichols Contracting appeared and testified. Barbara Curtis also testified.

EVIDENCE PRESENTED

1. Mrs. Curtis proposes to build an addition to replace the existing kitchen area of her home, which was originally constructed as an addition and which has fallen into significant disrepair.¹ She testified that she has lived in her home for 65 years. As presently configured, Mrs. Curtis's home has a kitchen on the main floor, a single bathroom located up a flight of "steep and narrow" stairs on the second floor, and laundry facilities located down a similar flight of stairs, in the basement. The proposed replacement addition would contain a new kitchen, bathroom and laundry area all on one, central floor of the home. The addition would comprise approximately 365 square feet, and appears to extend no closer to the rear lot line than the existing addition. See Exhibit 4(a).
2. Mrs. Curtis states that she has had two knee replacements that greatly restrict her movement, especially in negotiating stairs. She submits a letter from

¹ Mrs. Curtis testified that because of plumbing problems with the pipes located under the existing kitchen addition, her home has no water and no working heat.

her doctor, Suresh C. Gupta, that confirms that her knee replacements "significantly restrict her movements" and that indicates that negotiating the narrow stairwells in her home puts Mrs. Curtis "at risk for serious injury." Dr. Gupta's letter further states that "It is mandatory that Mrs. Curtis be able to rebuild this section of her home for her continued physical and mental well being." [Exhibit No. 8]. Mrs. Curtis has not been able to live in her home for several months.

3. In response to Board questions, Mr. Benson stated that the approximate cost of the proposed addition is \$102,000., and that the approximate cost to locate the addition at the eastern side of the property, where it would not need a variance, would be \$120,000. He noted that placing the addition on the east side of this house would eliminate the outside entrance to the basement which is used to service the furnace (oil), and would entail relocating the HVAC system to the second floor. He stated that the property contains no extraordinary or peculiar situation or condition that distinguishes it from properties around it.

FINDINGS OF THE BOARD

Section 59-G-3.1 of the Zoning Ordinance gives the Board of Appeals authority to grant variances, as authorized in Section 59-A-4.11(b), upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

The Board finds that the application does not meet the requirements of Section 59-G-3.1(a), and that the variance cannot be granted under Section 59-G-3.1 of the Zoning Ordinance.

Standards for Evaluation of a Variance on ADA/FHAA Grounds

A variance can be granted as a reasonable accommodation of a petitioner's disability under Title II of the Americans With Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), and the Fair Housing Amendments Act of 1988 (FHAA).

The ADAAA and FHAA define a disability, or handicap as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(1)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodation in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996). The failure to provide reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)). Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See, *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (2012). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

In connection with the grant of the variance on ADA and FHA grounds, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADAAA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking,

independent mobility) and the Board must determine whether it constitutes a major life activity under the ADAAA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because a zoning ordinance is among the local governmental rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance should be granted to the extent necessary to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the Zoning Ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. Based upon the evidence of record, including the letter from Dr. Suresh Gupta, and upon Mrs. Curtis's testimony, the Board finds that due to replacement surgery for both of her knees, Mrs. Curtis has severely reduced mobility, particularly in negotiating stairs, which constitutes a physical impairment for the purposes of the ADAAA and FHAA. The Board further finds that the ability to walk and to access eating and sanitation facilities in one's own house are major life activities which, for Mrs. Curtis, are curtailed by this physical impairment.

2. The Board further finds that the construction of the approximately 365 square-foot addition, located in the area of the existing kitchen, will allow for the location of cooking, eating, sanitation and laundry facilities on a single floor, and is a reasonable accommodation for Mrs. Curtis's mobility impairment which will allow Mrs. Curtis to safely access these facilities, and thus to continue to live in her home. The Board finds that allowing this construction on the rear of Mrs. Curtis's home would not impose an undue burden or expense on the County, and would not constitute a fundamental disruption of the County's zoning scheme. The Board notes that the proposed addition does not appear to be any closer to the rear lot line than the existing addition, and that allowing this rear addition does not subvert the purpose of the Zoning Ordinance, namely to protect and promote the health, safety, morals, comfort and welfare of the present and future inhabitants of the County.


3. The Board finds that the 9.25-foot variance, to allow the approximately 365 square-foot addition, should be granted so that the strict application of Montgomery County's development standards does not prevent Mrs. Curtis's continued use of her home, on account of her disability.

Therefore, based upon the Petitioner's binding testimony and evidence of record, the requested variance of 9.25 from the required 20-foot rear lot line setback to allow construction of a one-story addition, is granted subject to the following conditions:

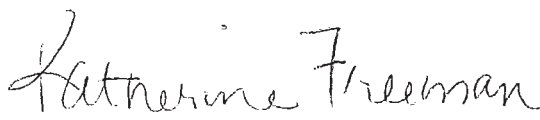
1. The Applicants are bound by her exhibits of record, her testimony and the testimony of her witnesses, to the extent that such testimony and evidence are identified in this Opinion.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 3, 4(a and b) and 5.

On a motion by David K. Perdue, seconded by Stanley B. Boyd, with Carolyn J. Shawaker, John H. Pentecost, and Catherine G. Titus, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.


Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
This 22nd day of May, 2014.


Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.